

#### REMARKS

This Amendment is submitted in reply to the final Office Action mailed on October 19, 2007. A Request for Continued Examination (“RCE”) is submitted herewith. The Director is authorized to charge the amount of \$810.00 for the cost of the RCE and any additional fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-586 on the account statement.

Claims 1-5, 7-16 and 28 are pending in this application and stand rejected. Of the rejected Claims, Claim 1 is the sole independent Claim. Claim 6 was previously canceled and Claims 17-27 were previously withdrawn. In the Office Action, Claims 1-5, 7-16 and 28 are rejected under 35 U.S.C. §112, first paragraph and 35 U.S.C. §112, second paragraph. Claims 1-5, 7-16 and 28 are rejected under 35 U.S.C. §103. In response, Claims 1, 3 and 7 have been amended. The amendments do not add new matter. In view of the amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claims 1-5, 7-16 and 28 are rejected under 35 U.S.C. §112, first paragraph as failing to comply with the enablement requirement. Specifically, the Patent Office alleges that because the specification does not reasonably provide enablement for “the glucose representing from 30 to 40% of the weight of the sweetening agent mixture.” See, Office Action, page 2, lines 19-21. In response, independent Claim 1 has been amended to recite “the glucose polymers comprise 30 to 40% by weight of glucose.” The amendment does not add new matter. The amendment is supported in the specification at, for example, page 6, lines 8-11. In view of the amendment and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claim 7 are rejected under 35 U.S.C. §112, first paragraph as failing to comply with the enablement requirement. Specifically, the Patent Office alleges that there is no support in the specification for the phrase “the sweetening agent mixture further comprises less than 1% by weight of fructose.” See, Office Action, page 3, lines 9-10. In response, dependent Claim 7 has been amended to recite, in part, the glucose polymers comprise less than 1% by weight of fructose. The amendment does not add new matter. The amendment is supported in the specification at, for example, page 6, lines 8-11. In view of the amendment

and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

Based on at least these noted reasons, Applicants believe that Claims 1-5, 7-16 and 28 fully comply with 35 U.S.C. §112, first paragraph.

Accordingly, Applicants respectfully request that the rejections under 35 U.S.C. §112 first paragraph be withdrawn.

In the Office Action, Claims 1-5, 7-16 and 28 are rejected under 35 U.S.C. §112, second paragraph, as allegedly being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. Specifically, the Patent Office alleges that Claim 1 is indefinite for the recitation of “the sweetening agent mixture comprises at least 90% of its weight of a sweetening component comprising glucose polymers and glucose . . . with the glucose polymers representing from 10 to 50% of the weight of the sweetening agent mixture and the glucose representing from 30 to 40% of the weight of the sweetening agent mixture, wherein the sweetening component constitutes from 6 to 30% of the total weight of the frozen dessert.” See, Office Action, page 3, line 24-page 4, line 1. In view of the amendments to Claim 1 as previously discussed, Applicants respectfully submit that the rejection should be withdrawn.

In the Office Action, Claim 1 is rejected under 35 U.S.C. §112, second paragraph, as allegedly being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. Specifically, the Patent Office alleges that Claim 1 is indefinite for the recitation of a “stabilizing agent capable of acting as nucleating agent.” See, Office Action, page 4, lines 10-12. In response, Claim 1 has been amended to recite, in part, a nucleating agent. The amendment does not add new matter. The amendment is supported in the specification at, for example, page 4, lines 18-28. Further, Applicants respectfully submit that the skilled artisan would recognize that the compound acts as a nucleating agent “during storage” at “usual storage temperature[s] used by a consumer of frozen products. See, specification, page 11, lines 14-17; page 4, lines 30-31 . The skilled artisan would also recognize that the “usual storage temperature used by a consumer of frozen products” would be similar to the storage temperature of a household freezer. Applicants also respectfully submit that the skilled artisan would easily recognize that a household freezer would have a temperature around 0° to 8° F, or about -18° C to about -13° C. In view of the amendments to

Claim 1, and for at least the reasons set forth above, Applicants respectfully submit that the rejection should be withdrawn.

In the Office Action, Claim 1 is rejected under 35 U.S.C. §112, second paragraph, as allegedly not being clear as to what is the freezing temperature range and what standard of malleability is employed to establish if a frozen dessert product is adequately malleable according to the claim as recited. See, Office Action, page 4, lines 20-23. Applicants respectfully disagree and submit that the scope of the present claims is clear to the skilled artisan.

With respect to the freezing temperature range, the specification teaches “a frozen dessert which, independently of any incorporation of gas, is malleable and extrudable at the usual storage temperature used by a consumer of frozen products.” See, specification, page 4, lines 29-31. As previously stated, Applicants respectfully submit that the skilled artisan would recognize that the “usual storage temperature used by a consumer of frozen products” would be similar to the storage temperature of a household freezer, which would have a temperature from about 0° to 8° F, or about -18° C to about -13° C. Moreover, the specification teaches storage at about -18° C and about -15° C. See, specification, Examples 1 and 2. For at least these reasons, Applicants respectfully submit that the scope of the present claims is clear to the skilled artisan.

With respect to the standard to establish sufficient malleability, the specification teaches that the frozen dessert should be “malleab[le] at a temperature of less than -15° C and [should have] perfect stability during storage.” See, specification, Example 2. The specification also teaches that at the freezing temperature, the frozen dessert should have a “spoonable character” and a “capacity to be distributed by the nozzle of a pressurized container,” such as an extruder. See, specification, page 5, lines 25-30. Moreover, the specification teaches that “sufficient malleability” of the dessert is achieved when the protein level in the composition is between 3 and 18% relative to the total weight of the composition of the dessert. See, specification, page 8, lines 19-22. As such, Applicants respectfully submit that the skilled artisan would understand what is meant by Applicants’ use of the term “malleability” and would recognize that the frozen dessert is capable of being readily deformed at usual storage temperatures for typical frozen desserts such that the frozen dessert may be readily deformed with a spoon or an extruder. For at least these reasons, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claim 3 is rejected under 35 U.S.C. §112, second paragraph, as allegedly being indefinite for failing to particularly point out and distinctly claim the subject

matter which Applicants regard as the invention. Specifically, the Patent Office alleges that Claim 3 is rejected for lack of antecedent basis and for being indefinite for the recitation of “the partially frozen water.” See, Office Action, page 4, lines 26-27. In response, Claim 3 has been amended to recite, in part, frozen water, to conform with the language of Claim 1 and to provide antecedent basis for the frozen water and to eliminate any issues of indefiniteness. The amendment does not add new matter. The amendment is supported in the specification at, for example, page 3, lines 6-14. In view of the amendment and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

Based on at least these noted reasons, Applicants believe that Claims 1-5, 7-16 and 28 fully comply with 35 U.S.C. §112, second paragraph.

Accordingly, Applicants respectfully request that the rejection under 35 U.S.C. §112 second paragraph be withdrawn.

In the Office Action, Claims 1-5, 7, 9-16 and 28 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,084,295 to Whelan et al. (“*Whelan*”) in view of U.S. Patent No. 3,128,193 to Hilker (“*Hilker*”). Claim 8 is rejected under 35 U.S.C. §103(a) as being unpatentable over *Whelan* in view of *Hilker* and further in view of U.S. Patent No. 4,452,824 to Cole (“*Cole*”). Claims 1-5, 9-14, 16 and 28 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,427,701 to Morley (“*Morley*”) in view of *Cole*. Applicants believe these rejections are improper and respectfully traverse them for at least the reasons set forth below.

Currently amended independent Claim 1 recites, in part, a sweetening agent mixture comprising glucose polymers and glucose, the glucose polymers comprising polymers of n molecules of glucose, wherein n is an integer between 2 and 10, inclusive, the glucose polymers comprising 30 to 40% by weight of glucose. The amendment does not add new matter. The amendment is supported in the specification at, for example, page 6, lines 8-11; page 7, lines 16-19. It is possible to advantageously use, as glucose polymers, the polymer fraction, which exists in a glucose syrup containing from 30 to 40% by weight of glucose. See, *Id.* Applicants have observed that, if the percentage of glucose increases in the composition, the frozen dessert obtained is more malleable. See, specification, page 6, lines 16-17.

Applicants have surprisingly found that it is possible to reduce the proportion of fat in a frozen dessert without limiting the malleability of the dessert at the freezing temperature, for

example, by using the sweetening agent mixture of glucose polymers and glucose at the levels as claimed. See, specification, page 5, lines 19-25. Moreover, Applicants observed that the presence, in the proportions as claimed, of these glucose polymers can make it possible to avoid or reduce the greasy taste of the frozen dessert without reducing the dessert's spoonable character and its capacity to be distributed by the nozzle of a pressurized container at the freezing temperatures. See, specification, page 5, lines 25-30. Consequently, besides any sweetening effects realized by the sweetening agent mixture, numerous textural effects were surprisingly discovered that go beyond the "sweetness effects" argued to be obvious by the Patent Office.

Furthermore, because the sweetening agents mixture can comprise from 10 to 50% of glucose polymers, it is possible to not only compensate for the reduction of the quantity of fat to be used in the composition of the frozen dessert according to the present invention, but also to allow a modification of the nature of the fat. See, specification, page 5, line 31 to page 6, line 1. Indeed, it becomes possible to use, for example, as a mixture with fat having an onset of solidification temperature less than 0 °C, a certain proportion of fat having an onset of solidification temperature between 0 and 40 °C, which provides greater flexibility in the taste of the frozen dessert according to the invention. See, specification, page 7, line 26-page 8, line 3. Therefore, it becomes possible to use whole milk as a source of proteins, for example, and no longer only skimmed milk, as was the case in previously known frozen desserts. The fat in the milk can now partially replace the fat having an onset of solidification temperature of less than 0 °C. See, specification, page 8, lines 3-9.

In addition, it is possible to advantageously use, as glucose polymers, the polymer fraction, which exists in a glucose syrup containing from 30 to 40% by weight of glucose. See, specification, page 6, lines 8-11. Applicants have observed that, if the percentage of glucose increases in the composition, the frozen dessert obtained is more malleable. See, specification, page 6, lines 16-17. In contrast, Applicants respectfully submit that the cited references are deficient with respect to the present claims.

*Whelan* fails to disclose or suggest a sweetening agent mixture comprising glucose polymers and glucose where the glucose polymers comprise 30 to 40% by weight of glucose as required, in part, by independent Claim 1. The Patent Office alleges that because *Whelan* discloses a corn syrup used as a nutritive sweetener having a value of 62 D.E. (dextrose equivalent), that *Whelan* discloses the glucose (dextrose) content of the corn syrup would vary

from 36 to 39% on a dry weight basis. In contrast, the Patent Office notes that 10-50% of Applicants' sweetening agent is glucose polymer and the glucose polymers have 30-40% by weight glucose. See, Office Action, pages 2-3. As such, Applicants respectfully submit that the amount of glucose (dextrose) contained in the glucose polymers of Applicants' sweetening agent is about 3% to about 20% (*i.e.*, 30-40% of the 10-50% glucose polymers).

*Hilker* also fails to disclose or suggest a sweetening agent mixture comprising glucose polymers and glucose where the glucose polymers comprise 30 to 40% by weight of glucose as required, in part, by independent Claim 1. The Patent Office even admits that "the amount of glucose falls in 50% or higher of the sweetener composition." See, Office Action, page 6, lines 16-17. As stated above, however, the Patent Office recognized that the amount of glucose in Applicants' sweetener composition is about 3% to about 20% (*i.e.*, 30-40% of the 10-50% glucose polymers). See, Office Action, pages 2-3. Because a range of "50% or higher" could never include a range of 3% to about 20%, *Hilker* fails to disclose each and every limitation of the present claims.

Moreover, Applicants respectfully disagree with the Patent Office's assertion that *Hilker* teaches the claimed ranges of glucose in the sweetener composition because *Hilker* teaches sucrose and "sucrose is a polymer of glucose, *i.e.*, n=2." See, Office Action, page 6, line 9. In fact, *Hilker* fails to disclose the glucose polymers (*e.g.*, sucrose) comprising polymers of n molecules of glucose, wherein n is an integer between 2 and 10, inclusive. See, *Hilker*, col. 3, lines 54-58 and col. 4, lines 26-29. Instead, *Hilker* teaches sucrose, or a disaccharide including a first unit of glucose and a second unit of fructose. In other words, sucrose does not involve n molecules of glucose where n is between 2 and 10. For at least the reasons discussed above, even if combinable, the cited references do not teach, suggest, or even disclose all of the elements of Claim 1 and Claims 2-5, 7, 9-16 and 28 that depend therefrom, and thus, fail to render the claimed subject matter obvious.

Applicants respectfully submit that *Whelan* and *Hilker* fail to disclose or even recognize the advantages, benefits and/or properties of a frozen dessert composition comprising a sweetening agent mixture comprising glucose polymers and glucose, with the glucose polymers representing from 10 to 50% of the weight of the sweetening agent mixture and the glucose polymers comprise 30 to 40% by weight of glucose in accordance with the present claims. Furthermore, the recited ranges requiring (i) the glucose polymers to represent from 10 to 50% of

the weight of the sweetening agent mixture and (ii) glucose polymers comprise 30 to 40% by weight of glucose, as claimed in independent Claim 1 achieve unexpected results relative to the prior art range.

Accordingly, Applicants respectfully request that the obviousness rejection with respect to Claims 1-5, 7, 9-16 and 28 over *Whelan* and *Hilker* be reconsidered and the rejection be withdrawn.

In the Office Action, Claim 8 is rejected under 35 U.S.C. §103(a) as being unpatentable over *Whelan* and *Hilker* in view of *Cole*. However, Applicants respectfully submit that the patentability of Claim 1 as previously discussed renders moot the obviousness rejection of Claim 8 that depends therefrom. In this regard, the cited art fails to teach or suggest all of the elements of Claim 8 in combination with the novel elements of Claim 1.

Accordingly, Applicants respectfully request that the obviousness rejection with respect to Claim 8 over *Whelan* and *Hilker* in view of *Cole* be reconsidered and the rejection be withdrawn.

In the Office Action, Claims 1-5, 9-14, 16 and 28 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Morley* in view of *Cole*. Applicants believe this rejection is improper and that, even if combinable, *Morley* and *Cole* fail to disclose every element of independent Claim 1.

*Morley* and *Cole* fail to disclose or suggest every element of independent Claim 1. For example, *Morley* and *Cole* fail to disclose or suggest the glucose polymers comprising polymers of n molecules of glucose, wherein n is an integer between 2 and 10, inclusive as required, in part, by independent Claim 1. *Morley* and *Cole* also fail to disclose or suggest the glucose polymers representing from 10 to 50% of the weight of the sweetening agent mixture as required, in part, by independent Claim 1. Finally, *Morley* and *Cole* fail to disclose or suggest the glucose polymers comprise 30 to 40% by weight of glucose as required, in part, by independent Claim 1.

*Morley* and *Cole* disclose sucrose and dextrose as suitable sugars. See, *Morley*, col. 6, lines 33-47; *Cole*, col. 2, lines 51-64. As discussed above, sucrose is not a glucose polymer comprising polymers of n molecules of glucose, wherein n is an integer between 2 and 10, inclusive. Furthermore, *Morley* in view of *Cole* fails to disclose the specific proportion of glucose and glucose polymers in a sweetening mixture as claimed. See, Office Action, page 10, lines 10-11. In addition, *Morley* and *Cole* now fail to disclose or suggest the glucose polymers

comprise 30 to 40% by weight of glucose as required, in part, by independent Claim 1 as amended. The Patent Office refers to Examples I and II of *Morley* to support its assertion that *Morley* discloses the claimed amounts of glucose in glucose polymers. For example, the Patent Office states that sorbitol may be replaced with glucose and that “Morley teaches of 8.5% 36 DE corn syrup solids (contain about 10% glucose) and 12.5% sorbitol (Column 9, Example 1).” See, Office Action, page 8, lines 12-15. However, Examples I and II fail to teach the amount of glucose present in glucose polymers as required, in part, by the present claims.

For at least the reasons discussed above, Applicants respectfully submit that the combination of *Morley* and *Cole* is improper. Moreover, even if combinable, the cited references do not teach, suggest, or even disclose all the elements of independent Claim 1 and Claims 2-5, 9-11, 16 and 28 that depend therefrom and, thus, fail to render the claimed subject matter obvious.

Accordingly, Applicants respectfully request that the obviousness rejection with respect to Claims 1-5, 9-14, 16 and 28 over *Morley* and *Cole* be reconsidered and the rejection be withdrawn.

Because *Whalen*, *Hilker*, *Morley* and *Cole* fail to disclose the glucose polymers comprising 30 to 40% by weight of glucose, Applicants respectfully disagree with the Patent Office’s assertions that Applicants have improperly argued each reference singularly. See, e.g., Office Action, page 9, lines 13-17. In contrast, Applicants respectfully submit that, to the extent that the references have been considered singularly, the references were considered in this manner solely for the purpose of demonstrating the impropriety of the obviousness rejection because every element of the present claims is not present in the combination of the cited references.

Further, the Patent Office asserts that Applicant’s statements that glucose makes the frozen dessert more malleable is of no moment because limitations from the claims cannot be read into the specification. However, although limitations in the specification cannot be incorporated into the claims, as noted by the Patent Office in the Office Action at page 10, Applicants respectfully submit that the specification must be considered when determining how Applicants intended the claims to be interpreted. For example, the surprising sweetening and texturizing effects of the sweetening mixture and sweetening mixture’s unique compensation of reduction of fat are not recited in the rejected claims. See, Office Action, page 10, lines 18-22.

However, Applicants respectfully submit that surprising results can be used to rebut a *prima facie* case of obviousness; they do not need to be recited in the claims. See, MPEP § 2144.05. Applicants respectfully submit that the recited ranges as claimed in independent Claim 1 achieve unexpected results relative to the prior art range and are not disclosed in the cited references. In this regard, Applicants respectfully submit these surprising results to rebut a *prima facie* case of obviousness for at least the reasons set forth herein.

Accordingly, Applicants respectfully request that the obviousness rejection with respect to Claims 1-5, 9-14, 16 and 28 be reconsidered and the rejection be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

BELL, BOYD & LLOYD LLC  
BY \_\_\_\_\_

Robert M. Barrett  
Reg. No. 30,142  
Customer No. 29157

Dated: October 30, 2007